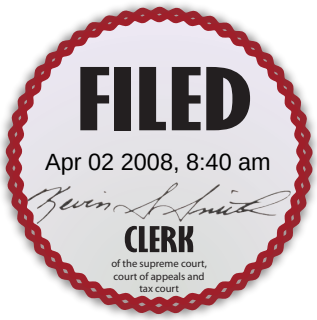

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IN THE
COURT OF APPEALS OF INDIANA

DAVID D. DARR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A04-0708-CR-439
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Darrin M. Dolehanty, Judge
Cause No. 89D03-0703-FC-4

April 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

David D. Darr appeals his conviction, after a jury trial, on one count of operating a motor vehicle after a lifetime suspension as an habitual traffic violator, a class C felony.

We affirm.

ISSUE

Whether statements by the trial court during trial constituted fundamental error so as to require that we reverse Darr's conviction.

FACTS

At approximately 6:00 p.m. on March 21, 2007, Traci Morris had taken her ten-year-old son Derek for a milkshake at the Dairy Queen. There, she saw a young woman she knew named Sierra Catt. Catt was with two men who were working under the hood of a pickup truck. Morris pulled near the truck and was talking with Catt.

The men started the truck and got in. Darr was on the driver's seat, and he told Catt to get in. Catt started to walk around to the driver's side because it was her father's truck, but Darr "told her 'No. He would f-ing drive." (Tr. 15). Catt got in the passenger seat.

Morris was concerned that the truck might break down and offered to follow it. Darr "said, 'No. We don't f-ing need you to follow us." (Tr. 16). Darr drove the truck away, and Morris decided to follow.

For the next several miles, Darr drove the truck erratically – "all over the road" – and at speeds exceeding the speed limit. (Tr. 19). Thinking that Darr "had been drinking," Morris called 911 on her cell phone. (Tr. 21). While Morris was on the phone

with the 911 operator, she saw the truck fail to "even slow down" for some railroad tracks, "ramp[] them," "tilt[]" and then "thr[o]w all three" occupants to the passenger side. (Tr. 20). Just past the tracks, the truck stalled. Morris stopped behind it. Catt and the passenger exited the truck from its passenger side and got in Morris' vehicle. Shortly thereafter, police officers arrived and arrested Darr.

On March 22, 2007, the State charged Darr with operating a motor vehicle after a lifetime suspension as an habitual traffic violator, a class C felony. A jury trial was held on May 9, 2007. At the outset of trial, and by stipulation of the parties, the trial court advised the jury that Darr's Indiana driving privileges had been suspended for life on September 14, 2004; that the suspension was in effect on March 21, 2007; and that Darr was aware of the lifetime suspension on that date. Thus, as Darr's counsel stated during his opening argument, the issue for the jury to determine was whether Darr "was operating the vehicle" on the evening of March 21st as alleged.

Morris testified as reflected above. The testimony of Derek, her ten-year-old son, was consistent with Morris' account, and he made an in-court identification of Darr as the driver of the truck. Catt testified that Darr had insisted on driving the truck; that Darr had been driving it "very fast"; and that she was "scared for [her] life" when the truck stalled after he had driven it across the railroad tracks so fast that the truck was briefly airborne. (Tr. 81). Darr took the witness stand and testified that he was not driving; Catt was. The jury returned a verdict finding Darr guilty as charged.

DECISION

Darr argues that in two separate matters, comments by the trial court – about which he raised no objection – rise to the level of fundamental error so as to require that we reverse his conviction.[1] We cannot agree.

"Fundamental error" is a doctrine of "extremely narrow applica[tion]." *Carter v. State*, 754 N.E.2d 877, 881 (Ind. 2001).

> A fundamental error is a substantial, blatant violation of basic principles of due process rendering the trial unfair to the defendant. It applies only when the actual or potential harm cannot be denied. The error must be so prejudicial to the rights of a defendant as to make a fair trial impossible.

Id. (internal citations omitted).

The first instance of what Darr argues to be improper comments by the trial court arose as follows. During Morris' testimony, the State offered the CD recording of Morris' conversation with the 911 operator. Darr objected, arguing *inter alia* that it was "cumulative," with "the repetition" of Morris' testimony being so "prejudicial" that the "[p]rejudice exceeds the value." (Tr. 23). In overruling the multiple bases of Darr's objection, the trial court held that "while the disk may necessarily be prejudicial, it does certainly contain, uh, evidence of probative value, and, uh, based on what was played for the court prior to trial, it does appear to be highly probative." (Tr. 24). Darr argues that this comment by the trial court "improperly comment[ed] on the evidence," essentially "vouch[ing] for the importance of this item of evidence." Darr's Br. at 4, 6.

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[1] Although Darr asserts the two instances of comments "by the trial court constituted fundamental error," Darr's Br. at 7, he neither defines that legal concept nor provides authority thereon in his brief.

As the State properly notes, the trial court's ruling was couched "in the language of the Indiana Rules of Evidence." State's Br. at 6. Evidence Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of *unfair* prejudice, ..." Ind. Evid. R. 403 (emphasis added). Moreover, we find that Darr's concerns about possible jury inferences drawn from the trial court's use of the word "probative" are directly addressed in the instructions given to the jury by the trial court.

One final instruction[2] stated that the jurors were "the exclusive judges of the evidence, and of the weight to be given to the testimony of each of them." (Tr. 118). Another stated that as to the trial court's rulings on the admissibility of evidence, the jury should not

> draw any inference from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, I have not determined the weight to be given to the evidence, nor the credibility of the witnesses. The weight of the evidence and the credibility of the witnesses are matters for you to determine.

(Tr. 120). In yet another instruction, the jury was directed as follows:

> If, during the progress of the trial, in ruling upon the admissibility of any evidence, or upon any objection or objection made by any attorney in the case, I have appeared to you to have indicated any opinion as to what has or has not been proved by the evidence, or as to the weight of any evidence or as to the credibility of any witness, you shall disregard such apparent opinion entirely. Such things are within your exclusive province to judge, and I have not intended to influence your judgment to any degree, as to any of them.

(Tr. 120-21).

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[2] The record contains only final instructions, as part of the trial transcript.

We presume that the jury followed the instruction of the trial court. *Pruitt v. State*, 622 N.E.2d 469, 473 (Ind. 1993); *Tormoehlen v. State*, 848 N.E.2d 326, 332 (Ind. Ct. App. 2006), *trans. denied*. Here, the jury was expressly and repeatedly instructed that it, and it alone, was to weigh the evidence and judge the credibility of the witnesses. Therefore, we cannot find that the words of the trial court's ruling on the admission of the recording constituted fundamental error that deprived Darr of his right to a fair trial. *Carter*, 754 N.E.2d at 881.

Next, Darr directs us to comments by the trial court during the course of ten-year-old Derek's testimony. He acknowledges that the trial court acted properly when it first elicited Derek's demonstration of his ability to distinguish between a truth and a lie, and his commitment to testify truthfully. However, as error, Darr cites to four subsequent "interven[tions]" by the trial court during Derek's testimony, and argues that the trial court thereby "put undue stress on the truthfulness of this testimony, . . . amount[ing] to the trial court conveying to the jury that the trial court had assured the veracity of Derek's testimony for the jury." Darr's Br. at 6, 7.

The first instance of "intervention":

> Q. Let's take just a little break then. Do you remember we talked earlier about the truth and fibs or lies? Anything you told me so far been a fib?
>
> A. No.
>
> Q. Everything's been the truth so far?
>
> A. Yes.
>
> Q. That's the rule for the rest of the time you're talking, okay?

A. Yeah.

(Tr. 51). Second,

Q. Uh, we talked earlier about telling the truth and telling fibs. How you doin' on that so far?

A. Everything's the truth.

Q. Everything's been the truth? You don't need to take anything back?

A. No.

(Tr. 59). Third, just before cross-examination by defense counsel was to commence,

Q. This is when he gets to . . . ask you some questions. The same rules apply. Do you understand? You gotta speak up plenty loudly, and you gotta tell the truth. Alright?

A. Yes.

(Tr. 61). Finally, at the conclusion of Derek's cross-examination,

Q. Okay. Now the things you talked to [defense counsel] about, were all of those things the truth?

A. Yes.

Q. Do you need to take any of them back?

A. No.

Q. You understand I'll let you if something was wrong I'll let you take it back and you can tell me the right thing. Do you understand that?

A. Yes.

Q. Do you need to take anything back at all?

A. No.

(Tr. 65).

We find that the trial court's colloquies with Derek can as easily be found to question the truthfulness of Derek's testimony, which would benefit Darr, as to vouch for it. Moreover, the instructions quoted in the preceding discussion advised the jury that it alone was to judge witness credibility and weigh the evidence, and to not draw any inferences from statements of the trial court in that regard. As we have already noted, we presume that the jury followed the instructions given it by the trial court. Therefore, we find no fundamental error here.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.